(2)

No. 09-484

IN THE
SUPREME COURT OF THE UNITED STATES

STEVEN O'BRIEN,
SUPERINTENDENT, OLD COLONY CORRECTIONAL CENTER
Petitioner

v.

MICHAEL O'LAUGHLIN,
Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

For the Respondent:

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QUESTION PRESENTED

Whether certiorari is compelled, where the First Circuit applied the correct standard of review under AEDPA; that is, under the standard governing the sufficiency of the evidence established in *Jackson v. Virginia*, 443 U. S. 307 (1979), the state court's decision was objectively unreasonable, and did not apply an incorrect standard of "reasonable speculation."

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SUMMARY OF ARGUMENT

There is no reason to grant certiorari in this matter. This case presents a fact-intensive sufficiency-of-the-evidence review. It presents an extremely rare instance where a state court's determination as to guilt beyond a reasonable doubt is so incorrect as to be objectively unreasonable under the applicable standard outlined in AEDPA.

The Petitioner approaches this matter under the presumption that the First Circuit applied an incorrect standard of review ("reasonable speculation") under AEDPA. This entire argument is mistaken, where the First Circuit applied the correct standard of review; that is, whether under the *Jackson v. Virginia* standard of review governing the sufficiency of the evidence, the state court's decision was objectively unreasonable. The First Circuit correctly carried out its statutory obligations under AEDPA when it reviewed the record and ruled that the totality of the evidence was insufficient to warrant a conviction. The Petitioner is not entitled to certiorari where it merely disagrees with the First Circuit's final conclusion. The decision must be left alone.

REASONS FOR DENYING CERTIORARI

A. Certiorari is not compelled by Sup. Ct. R. 10.

Pursuant to Sup. Ct. R. 10, certiorari "will be granted only for compelling reasons." None of the reasons contemplated by Rule 10 compel

certiorari in this matter.

Rule 10(a) does not apply, because the Petitioner has not alleged that the First Circuit decision "conflicts with the decision of another Court of Appeals on the same important matter". Nor has the Petitioner argued that the First Circuit "decided an important federal question in a way that conflicts with a state court of last resort"; or that the decision "departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory powers". See Sup. Ct. Rule 10(a).

Sup. Ct. R. 10(b) is also inapplicable, because the case at bar does not present a situation where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals."

Nor can the Petitioner meet the requirements of Rule 10(c); that a state court or the First Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. As will be shown below, the First Circuit opinion in the instant matter is in compliance with the relevant decisions of the Supreme Court.

B. **The nature of the First Circuit Opinion militates against review**

The First Circuit opinion is unanimous. *O'Laughlin III* at 289. It does not set a precedent. The First Circuit upheld the decision on a petition for rehearing and en banc review with only one dissent. *O'Laughlin IV* at 1.

C. **The First Circuit complied with AEDPA and applied the correct standard of review.**

The primary complaint in the certiorari petition is that the First Circuit departed from the standard of review enunciated in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and *Jackson v. Virginia*, 443 U.S. 307 (1979). This argument is without merit. In no way did the First Circuit either depart from the correct standard of review or exceed its review powers under AEDPA.

In its opinion, the First Circuit carefully detailed the applicable standard of review. *O'Laughlin III* at 298-300. As the court noted, under AEDPA, a federal court shall not grant a petition for habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings" unless the state court decision: 1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or 2) "was based on an unreasonable determination of the facts in light of the

evidence presented in the State court proceeding." *O'Laughlin III* at 298, citing 28 U.S.C. §2254(d)(1)-(2).

The First Circuit's application of the AEDPA standard required the layering of two standards: "The habeas question of whether the state court decision is objectively unreasonable is layered on top of the underlying standard governing the constitutional right asserted." *O'Laughlin III* at 299, quoting *Hurtado v. Tucker*, 245 F. 3d 7, 16 (1st Cir. 2001). This is the correct standard of review, in full compliance with the Supreme Court ruling in *Williams v. Taylor*, 529 U.S. 362 (2000).

This analysis required the First Circuit to apply the *Jackson* standard, because the constitutional right asserted is the due process requirement that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof--defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *O'Laughlin III* at 299, quoting *Jackson v. Virginia*, 443 U.S. at 316.

As the First Circuit explained, "...[t]he relevant test we take from *Jackson* is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *O'Laughlin III* at 299, quoting *Jackson v. Virginia*, 443 U.S. at 319.

The First Circuit thus had to decide whether the state court's

application of *Jackson v. Virginia* was "objectively unreasonable". *O'Laughlin* at 299. The First Circuit was therefore in total compliance with AEDPA and *Williams v. Taylor*.

The First Circuit further detailed the applicable standard under *Jackson v. Virginia*, that is, "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt". *O'Laughlin III* at 300-301, quoting *Jackson v. Virginia*, *supra* at 319.

The court noted the difficulty of applying the *Jackson* standard to a situation where, as in the case at bar, there were no witnesses to identify the perpetrator. *O'Laughlin III* at 300. But the court fully recognized that circumstantial evidence is permissible to identify the perpetrator *O'Laughlin III* at 301. The court noted that "[g]uilt beyond a reasonable doubt cannot be premised on pure conjecture. But a conjecture consistent with the evidence becomes less and less a conjecture, and moves gradually toward proof, as alternative innocent explanations are discarded or made less likely." *O'Laughlin III* at 301.

It is therefore clear that before the First Circuit applied its analysis under the applicable standard of review, in no way did it ignore the settled principle of law that circumstantial evidence and all the inferences therefrom could suffice to meet the *Jackson* standard.

The First Circuit also expressed its full recognition of the deference that it must pay to state court decisions:

"...[A]s a general rule, federal courts should be particularly cautious about issuing habeas, on grounds of the objective unreasonableness of a state court's conclusion that the evidence is sufficient, where there has been a verdict of guilt by a jury of a defendant's peers, where the defendant's credibility was evaluated by the jury hearing his testimony, where that verdict has been affirmed on appeal in the state system, and where there is no claim of constitutional error in the conduct of the trial." *O'Laughlin III* at 300 fn. 16, citing *Hurtado v. Tucker*, 245 F.3d 7, 19-20 (1st Cir. 2001).

The First Circuit further commented on deference AEDPA required: "Although we have identified several gaps in the SJC's analysis, we are mindful that on habeas review under AEDPA we are not permitted to grant a writ if we merely disagree with the jury verdict or if we identify an error in the SJC's reasoning". *O'Laughlin III* at 304.

The First Circuit further noted, "We once again acknowledge the extremely high bar that must be overcome on habeas review to overturn a state court decision; however, that bar is not insurmountable and on rare occasions we have held a state court decision to be objectively unreasonable". *O'Laughlin III* at 304.

To demonstrate the deference it gives to state court decisions, the

First Circuit was able to cite *only one case* where it reversed a state court conviction under the objectively unreasonable standard. *O'Laughlin III* at 304, citing *White v. Coplan*, 399 F.3d 18 (1st Cir. 2005), cert. denied sub nom, *Cattell v. White*, 546 U.S. 972 (2005) [holding on habeas review that state court unreasonably applied Supreme Court's Confrontation Clause jurisprudence where state court barred petitioner from cross examining complainants regarding prior accusations].

The First Circuit clearly followed the correct standard of review and proper deference pursuant to AEDPA and *Jackson v. Virginia*.

D. **The First Circuit did not adopt a standard of review of "reasonable speculation."**

As shown above, the First Circuit applied the correct standard of review. But the Petitioner's entire argument is premised upon a canard: that the First Circuit adopted an incorrect standard of review of "reasonable speculation" (See Petition, pages 16-21). This argument is without merit. In no way did the First Circuit adopt a new test of "reasonable speculation". Rather, the Petitioner is coopting the First Circuit's use of that particular phrase to argue that the First Circuit applied an incorrect standard of review, which it clearly did not.

An examination of each use of the phrase "reasonable speculation" demonstrates that this is not an adoption of an improper standard of

review. It is important to note that in the sections of the opinion where the First Circuit explains the applicable standard of review, the court never uses the phrase "reasonable speculation." *O'Laughlin III* at 298-301.

The phrase does not appear until the analysis of the SJC's opinion, where the First Circuit finds that "[a]lthough circumstantial evidence alone can support a conviction, there are times that it amounts to only a *reasonable speculation* and not to sufficient evidence." *O'Laughlin III* at 302, quoting *Newman v. Metrish*, 543 F.3d at 796 [emphasis added].

The phrase next appears when the First Circuit finds that "The instant facts may support a *reasonable speculation* that O'Laughlin was the assailant, but not sufficient evidence to establish his guilt. Taken together, the circumstantial evidence in this case, even when drawing all reasonable inferences in favor of the prosecution, does not permit any rational jury to conclude that O'Laughlin was the assailant beyond a reasonable doubt." *O'Laughlin III* at 302 [emphasis added].

The First Circuit further compared the instant case to *Newman v. Metrish*: "[w]ithout additional evidence placing [him] at the scene of the crime, there is only a *reasonable speculation* that [he] was present .....where the evidence taken in the light most favorable to the prosecution creates only a *reasonable speculation* that a defendant was present at the crime, there is insufficient evidence to satisfy the *Jackson*

standard." *O'Laughlin III* at 306, quoting *Newman v. Metrish, supra* at 797 [emphasis added].

The First Circuit's use of the phrase "reasonable speculation" therefore demonstrates that the phrase is not an adoption of an incorrect standard of review. The phrase means that speculation was necessary to reach the conclusion that the evidence was sufficient to support a conviction. The First Circuit demonstrates this by consistently pairing the phrase "reasonable speculation" with additional statements that the circumstantial evidence, and all the reasonable inferences therefrom, was insufficient to support a conviction. *O'Laughlin III* at 302, 306.

The First Circuit further demonstrates that the phrase "reasonable speculation" is not a standard which it applied, but rather a term of art to describe the insufficiency of the evidence: "Although we must draw all reasonable inferences in favor of the prosecution, a 'reasonable' inference is one that is supported by a chain of logic, rather than, as in this case, mere speculation dressed up in the guise of evidence." *O'Laughlin III* at 307, quoting *Juan H. v. Allen*, 408 F. 3d. 1262, 1277 (9th Cir. 2005), cert. denied sub nom, *Juan v. Allen*, 546 U.S. 1137 (2006).

The First Circuit's use of the phrase "reasonable speculation" therefore is not the adoption of an incorrect legal standard. Rather, it is a consistent application of the *Jackson* standard, which allows for

convictions based on "all reasonable inferences" but of course does not provide for guilty convictions based on reasonable speculation.

The argument that the phrase "reasonable speculation" is not a new and incorrect standard of review, but rather a term of art to describe the state of the evidence, is further demonstrated by the Sixth Circuit in *Tucker v. Palmer*, 541 F.3d 652, 669 (6th Cir. 2008): "This Court's habeas jurisprudence in cases involving insufficiency of evidence has repeatedly distinguished between evidence that can lead to *reasonable speculation* of guilt and evidence sufficient to prove guilt beyond a reasonable doubt. Here, the government's sparse evidence, at best, provided speculation that Tucker committed the crime. This Court is to grant habeas relief when convictions are based solely upon mere *reasonable speculation* instead of evidence sufficient to prove guilt beyond a reasonable doubt." *Tucker v. Palmer*, 541 F.3d at 669 [emphasis added].[1]

It is thus quite clear that the phrase "reasonable speculation" is not to be confused with the legal standard of "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier

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See Black's Law Dictionary definition of "speculation": "*speculation, upon which neither court in nonjury case nor jurors in jury case may base verdict, is the art of theorizing about a matter as to which evidence is not sufficient for certain knowledge.*" Black's Law Dictionary, Abridged Fifth Edition, 727. See also the ordinary dictionary definitions: To "speculate" is to "*form a theory or conjecture without firm evidence.*" Concise Oxford English Dictionary, Eleventh Edition, 1386. To "speculate" is "*to take to be true on the basis of insufficient evidence.*" Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/speculate.

of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. at 319. The First Circuit's use of this term of art must not be construed as an adoption of an incorrect standard of review.

It is clear from a full reading of the opinion in *O'Laughlin III* that even if the First Circuit had never used that particular phrase, the conclusion would have been the same; that is, the SJC's conclusion was objectively unreasonable because the conviction was based on speculation.

In his concurring opinion on the denial of the petition for en banc rehearing, Justice Torruella clarified that the term "reasonable speculation" is not meant as a new standard of review: "...the dissent mischaracterizes the reasoning of the unanimous panel". *O'Laughlin IV* at 9. Justice Torruella notes that the opinion "neither articulates nor applies a sufficiency of the evidence test inconsistent with the Supreme Court's clearly established law under *Jackson v. Virginia* [citation omitted]." *Id.* "To suggest that the panel opinion adopts 'reasonable speculation' as some sort of binding 'legal rule' is incorrect." *Id.*

Justice Torruella further noted that "our use of the term 'reasonable speculation' merely frowns upon speculative evidentiary interpretations and in no way suggests we disfavor the use of circumstantial evidence" *O'Laughlin IV* at 9. Justice Torruella referred

to the panel opinion, which stated that, "direct evidence of identification is not necessary" *Id.*, quoting *O'Laughlin III* at 301 n. 17. This establishes that the First Circuit was fully cognizant that the conviction could indeed be based on reasonable inferences, and there did not need to be direct evidence of identification. Rather, all the inferences amounted to "mere speculation dressed up in the guise of evidence". *O'Laughlin III* at 307.

Therefore, the argument that the First Circuit departed from the standard of review outlined in AEDPA and *Jackson v. Virginia* is incorrect. The First Circuit engaged in an intensive fact-specific application of the *Jackson* standard, and concluded that the SJC's determination was objectively unreasonable. *O'Laughlin IV* at 9-10. The argument that the First Circuit applied an incorrect standard of "reasonable speculation" is nothing more than a back-door effort to have the Supreme Court review the evidence again and possibly arrive at a different conclusion. Certiorari is not available for this purpose (See Argument I below, also Sup. Ct. Rule 10). The certiorari petition must fail once it is recognized that the First Circuit applied the correct standard of review.

E. The First Circuit grants full deference to state court decisions.

As noted above in Argument C, the First Circuit expressed its full recognition of the deference that it must pay to state court decisions:

"...[A]s a general rule, federal courts should be particularly cautious about issuing habeas, on grounds of the objective unreasonableness of a state court's conclusion that the evidence is sufficient, where there has been a verdict of guilt by a jury of a defendant's peers, where the defendant's credibility was evaluated by the jury hearing his testimony, where that verdict has been affirmed on appeal in the state system, and where there is no claim of constitutional error in the conduct of the trial." *O'Laughlin III* at 300 fn. 16, citing *Hurtado v. Tucker*, 245 F.3d 7, 19-20 (1st Cir. 2001).

The First Circuit decisions in sufficiency-of-the-evidence cases bear out its own admonition of the deference it pays to state courts. In fact, the decision in *O'Laughlin III* is the only First Circuit decision to reverse a state court conviction on sufficiency-of-the-evidence grounds.

The First Circuit upheld the state court decisions on sufficiency-of-the-evidence grounds in the following cases: *Leftwich v. Maloney*, 532 F.3d 20, 21-28 (1st Cir. 2008); *Foxworth v. St. Amand*, 570 F.3d 414, 425-429 (1st Cir. 2009); *Kater v. Maloney*, 459 F.3d 56, 67-68 (1st Cir. 2006); *Allison v. Ficco*, 388 F.3d 367, 371 (1st Cir. 2004), cert. denied, 544 U.S. 1039 (2005); *Hurtado v. Tucker*, 245 F.3d 7, 14-20 (1st Cir. 2001), cert. denied 534 U.S. 925 (2001); *Hall v. Dipaolo*, 72 F.3d 243, 245 (1st Cir. 1996); *Stewart v. Coalter*, 48 F.3d 610, 613-617 (1st Cir. 1995); *Ortiz v. Dubois*, 19 F.3d 708, 717 (1st Cir. 1994); *Palmariello v. Superintendent*,

M.C.I. Norfolk, 873 F.2d 491 (1st Cir. 1989).

As noted earlier, there is only one other case where the court reversed a state court conviction under the objectively unreasonable standard, but not on a sufficiency-of-the-evidence claim. See *O'Laughlin III* at 304, citing *White v. Coplan*, 399 F.3d 18 (1st Cir. 2005), cert. denied sub nom, *Cattell v. White*, 546 U.S. 972 (2005) [state court unreasonably applied Supreme Court's Confrontation Clause jurisprudence where state court barred petitioner from cross examining complainants regarding prior accusations].

Clearly, habeas relief in the First Circuit is extremely rare. The Petitioner's argument that the First Circuit does not pay proper deference to the state court is therefore without merit. The First Circuit has been reviewing sufficiency-of-the-evidence habeas claims with great deference to state court decisions. But as the First Circuit noted, "in rare instances there are fact-intensive cases where a state court's determination as to guilt beyond a reasonable doubt is so incorrect as to be objectively unreasonable." *O'Laughlin IV* at 10. There is no need for alarms bells to ring because the First Circuit has finally reversed one state court decision on this basis.

F. **The warning that certiorari should be granted to prevent federal habeas retrials of state criminal convictions has no foundation, where the court applied the correct standard of review.**

In addition to arguing that the First Circuit applied an incorrect standard of review, the Petitioner warns that the Supreme Court should grant certiorari in order to prevent federal habeas retrials of state criminal cases (See Petition, pages 13-16). The argument must be rejected where the First Circuit followed the letter of the law.

The Petitioner argues that by enacting AEDPA, Congress placed "more, rather than fewer, limits on the power of federal courts to grant writs of habeas corpus to state prisoners." See Petition, page 13, citing *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). The added restraints were intended to prevent federal habeas retrials and to ensure that state court convictions are given effect to the extent possible under law. See Petition, page 13, citing *Bell v. Cone*, 535 U.S. 685, 693 (2002).

This is a correct statement of the law. But AEDPA specifically granted the First Circuit the statutory authority to review state court convictions. This of course is the purpose of the long-standing right of habeas review. As long as the federal court applies the correct standard of review, and demonstrates the proper deference to the state court, there is no reason to disturb the decision. Apparently, with this argument, the Petitioner would never agree with any federal habeas reversal of a state

court conviction.

The Petitioner warns that certiorari is warranted to prevent federal habeas retrials in sufficiency-of-the-evidence cases (See Petition, pages 15-16). If the Petitioner is warning that federal habeas review will result in state court retrials, the argument is misplaced, because the case at bar does not present a situation where federal habeas relief will result in a retrial. The First Circuit ruled that because double jeopardy principles applied, the court remanded the case for the Respondent's release with prejudice to reprosecution. *O'Laughlin III* at 309, citing *Burks v. United States*, 437 U.S. 1, 18 (1978).

This is a correct application of the law as set forth by the Supreme Court. The Supreme Court recently ruled that where an appellate court reverses a conviction for lack of constitutionally sufficient evidence, that determination constitutes an acquittal which, under the Double Jeopardy Clause, precludes further prosecution. *Yeager v. United States*, 08-67 (U.S. 6-18-2009), citing *Burks v. United States*, 437 U. S. at 11.

The Petitioner cites a number of cases in support of its argument, but none of the cited cases are sufficiency-of-the-evidence cases where double jeopardy applies. See *Bell v. Cone*, 535 U.S. 685, 693 (2002) [claim of ineffective assistance of counsel]; *Miller-El v. Cockerell*, 537 U.S. 322 (2003) [claim that prosecutor's use of peremptory strikes to exclude African-American jurors violated equal protection laws]; *Schriro v.*

Landrigan, 550 U.S. 465 (2007) [claim of ineffective assistance of counsel at death penalty hearing]; *Yarborough v. Alvarado*, 541 U.S.652 (2004) [claim that statement was introduced in violation of Miranda]; *Mitchell v. Esparza*, 540 U.S. 12 (2003) [claim of ineffective assistance of counsel at sentencing, and that death penalty could not be imposed under the state statute]; *Lockyer v. Andrade*, 538 U.S. 63 (2003) [claim that California's three strikes law violated the constitutional provision against cruel and unusual punishment]; *Brown v. Payton*, 544 U.S. 133 (2004) [claim of erroneous argument by prosecutor regarding death penalty factors]; *Woodford v. Garceau*, 538 U.S. 202 (2003) [respondent's application was subject to AEDPA's amendments where it was filed after AEDPA's effective date]; *Williams v. Taylor*, 529 U.S. 362 (2000) [claim of ineffective assistance of counsel at death penalty hearing]; *Woodford v. Visciotti*, 537 U.S. 19 (2002) [claim of ineffective assistance of counsel at death penalty phase]; *Uttecht v. Brown*, 551 U.S. 1 (2007) [claim that juror was improperly excused for cause on the ground that he could not be impartial in deciding whether to impose the death sentence]; *Early v. Packer*, 537 U.S. 3 (2002) [claim of jury coercion of deadlocked jury].

The case at bar is strictly a sufficiency-of-the-evidence case where, in accordance with double jeopardy principles, the Respondent can not be retried.

G. The Supreme Court has denied certiorari in sufficiency-of-evidence cases.

The Supreme Court has already denied certiorari in sufficiency-of-the-evidence cases where the circuit court of appeals applied the *Jackson* standard and the "objectively unreasonable" standard under AEDPA. While not exhaustive, see *Juan H. v. Allen*, 408 F. 3d. 1262 (9th Cir. 2005), cert. denied sub nom, *Juan v. Allen*, 546 U.S. 1137 (2006); *Fuller v. Anderson*, 662 F. 2d 420 (6th Cir. 1981), cert. denied sub nom, *Anderson v. Fuller*, 455 U.S. 1028 (1982); *Chein v. Shumsky*, 373 F.3d 978, 993 (9th Cir. 2004), cert. denied, sub nom, *Shumsky v. Chein*, 543 U.S. 956 (2004); *Perez v. Cain*, 529 F.3d 588 (5th Cir. 2008), cert. denied 129 S. Ct. 496 (2008). There is no reason to grant certiorari in the case at bar where the Court has already denied certiorari in similar cases.

H. The First Circuit decision requires no clarification of the applicable standard of review.

The Petitioner argues that this case requires "clarification" of the *Jackson* application to sufficiency-of-the-evidence cases, and for "reaffirming" AEDPA's restrictions on federal habeas review. See Petition, pages 22-30. There is no need for clarification where the First Circuit assiduously applied the correct standard of review, and paid full heed to the deference owed to the state court decision. There is no reason

to "reaffirm" a settled standard which the First Circuit correctly applied. The Petitioner argues that the standard of review needs to be clarified and reaffirmed, and then uses this argument as a springboard to attack the First Circuit's conclusion, which is an improper basis for certiorari (see Argument I, below). The Respondent asserts that this argument is a further effort to have the Supreme Court review the evidence and possibly arrive at a different conclusion than the First Circuit.

The Petitioner also mistakenly compares the case at bar with another matter where the government's certiorari petition is pending: *Brown v. Farwell*, 525 F. 3d 787 (9th Cir. 2008), cert. granted sub nom, *McDaniel v. Brown*, 129 S. Ct. 1038 (2009). See Petition, page 30.

The comparison is incorrect. *McDaniel v. Brown* at first presented two questions: (1) What is the standard of review for a federal habeas court for analyzing a sufficiency of the evidence claim under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)?; and (2) Does analysis of a sufficiency of the evidence claim pursuant to *Jackson* v. *Virginia*, 443 U.S. 307, 318-19 (1979), under 28 U.S.C. § 2254(d)(1) permit a federal habeas court to expand the record or consider nonrecord evidence to determine the reliability of testimony and evidence given at trial? See Brief of Respondent, No. 08-559, page i.

The Supreme Court granted certiorari on these questions, but the Court later removed *McDaniel* from the calendar after the habeas

petitioner conceded that the case did not present a question of sufficiency of evidence, but rather whether the state trial court improperly admitted DNA evidence in violation of the Due Process Clause. See Reply Brief for McDaniel, Warden, and the Attorney General of Nevada, No. 08-559, pages 1-3.

McDaniel v. Brown no longer concerns questions regarding sufficiency-of-the-evidence standards under AEDPA. There is thus no reason to compare it to the case at bar.

I. The argument that the First Circuit misapplied a properly stated rule of law is not a proper basis for certiorari.

Under the Rules of the Supreme Court, certiorari is not available where the Petitioner argues that the First Circuit misapplied a properly stated rule of law. See Sup. Ct. R. 10: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Therefore, the Petitioner's attack on the First Circuit's application of the standard of review to the facts of instant case (See Petition, pages 23-28) is not a basis for certiorari.

If the Supreme Court rejects the Petitioner's argument that the First Circuit applied an incorrect "reasonable speculation" standard of review, then the remainder of the Petitioner's arguments (such as the

argument that the "reasonable speculation standard devalues circumstantial evidence"), must fail. See Petition, page 20.

But the Petitioner goes on to assail the First Circuit's analysis of the evidence (Petition, pages 23-29). This is an inappropriate argument, because the Supreme Court does not grant certiorari to review evidence and discuss specific facts. *Superintendent v. Hill*, 472 U.S. 445, 460-461 (1985), citing *United States v. Johnston*, 268 U.S. 220, 227 (1925). Certiorari should be denied where the petitioner claims that a correct view of the law was incorrectly applied to the facts. *Kyles v. Whitley*, 514 U.S. 419, 456 (1995).

J. **The First Circuit correctly applied the standard of review to the evidence.**

In his concurring opinion in *O'Laughlin IV*, Justice Torruella set aside any complaints that the court engaged in a piecemeal examination of the evidence. *O'Laughlin IV* at 9. The panel reviewed the sufficiency of the evidence as a whole, and in its totality. *Id.*

The First Circuit had already demonstrated this in *O'Laughlin III*: "Taken together, the circumstantial evidence in this case, even when drawing all reasonable inferences in favor of the prosecution, does not permit any rational jury to conclude that O'Laughlin was the assailant beyond a reasonable doubt." *O'Laughlin III* at 302. "Given the

insufficiency of the evidence, circumstantial or otherwise, tying O'Laughlin to the attack, we conclude that a rational jury could not find O'Laughlin's guilt beyond a reasonable doubt." *O'Laughlin III* at 304.

As Justice Torruella explains, to arrive at its conclusion, the court considered the factors the SJC weighed. *O'Laughlin IV* at 9. This included evidence of motive, opportunity, means, and consciousness of guilt. *Id.*

Justice Torruella further answered the complaint that the panel had engaged in a de novo review of the record. "The opinion recounts the facts as presented by the SJC and holds, drawing all reasonable inferences in favor of the prosecution, that the SJC was objectively unreasonable in concluding that O'Laughlin was the assailant beyond a reasonable doubt. This approach was not legal error. The bottom line is that we read the record differently than the dissent, not that we apply the wrong legal standard." *O'Laughlin IV* at 9-10.

Indeed, the First Circuit recited a complete statement of facts, as found by the SJC. *O'Laughlin III* at 290-295. Of course, it was impossible for the First Circuit to review the evidence as a whole without discussing specific but important details. This is what appellate courts must do, especially in cases such as the present one, which involved over forty witnesses and 2000 transcript pages. This is what the SJC did in *O'Laughlin II*. But any complaint in the Petition or the en banc dissent in *O'Laughlin IV* that the First Circuit engaged in a piecemeal review of

the evidence must be rejected.

The First Circuit further stated that "we are mindful that on habeas review under AEDPA we are not permitted to grant a writ if we merely disagree with the jury verdict." *O'Laughlin III* at 304.

K. **The Petitioner's complaints regarding the First Circuit's conclusions must be rejected.**

The First Circuit reviewed the totality of the evidence in a light most favorable to the government, and concluded that this case presented a rare instance where a state court's determination as to guilt beyond a reasonable doubt was so incorrect as to be objectively unreasonable. *O'Laughlin IV* at 10.

Of note is that the Massachusetts Appeals Court earlier also concluded that the evidence was insufficient to identify O'Laughlin as the perpetrator of the crime. *O'Laughlin I.*

Of further note is that on further appellate review, the SJC affirmed the convictions, but only after finding that the case was "a close one." *O'Laughlin II* at 189.

It is important to recite certain undisputed facts, especially the absence of any physical evidence connecting O'Laughlin to the crime scene. The police recovered fourteen fingerprints and one palm print from

Mrs. Kotowski's apartment, none of which matched those of O'Laughlin. In addition, footprint impressions taken at the apartment did not match O'Laughlin's boots. State Police Lieutenant Brian O'Hara, trained in fingerprint analysis and bloodstain patterns, opined that a blood stain on Mrs. Kotowski's pillow was caused by the transfer of blood from a person's right hand, but the handprint was unidentifiable. He testified that the hand had to have had a significant amount of blood on it, not all of which would have been transferred. *O'Laughlin III* at 294.

The Commonwealth's case was based solely on circumstantial evidence.[2] The entirety of that evidence failed to place O'Laughlin inside the apartment where the assault occurred.

In addition to the lack of physical evidence in Ms. Kotowski's apartment to establish his presence, there was also no evidence inside O'Laughlin's apartment to create any inference that he had been inside her apartment. Ms. Kotowski was excluded from contributing to any of the stains found in his apartment (Tr. Vol. 7:198,230). The stain in O'Laughlin's apartment matched his own DNA (Tr. Vol. 7:197). See also *O'Laughlin II* at 197-198.

Despite the copious amount of blood found at the scene and on the

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2 The SJC found that the Commonwealth relied "wholly on circumstantial evidence." *O'Laughlin*, 446 Mass. at 198. The trial judge instructed the jury that "...the Commonwealth's case is based solely upon circumstantial evidence..." (Tr. Vol. 9:119).

victim, there was no blood at all on O'Laughlin when the police encountered him walking from his apartment just a few minutes after they responded to the dispatch, and there was no evidence of bloody clothes found in his apartment during the search, or anywhere else on the premises.

At trial, the defense presented abundant evidence to shed even further doubt on O'Laughlin's guilt. O'Laughlin's theory was that another individual, the victim's estranged husband, may have committed the assault. There was prosecution evidence that their marital separation had upset the husband, but O'Laughlin's witnesses--including the victim's sister and a close friend--revealed that he was angrier at his wife than either one of them cared to admit at trial, and he had berated her and called her names (Tr. Vol. 8:51-52,164-165).

On the evening after the assault, the husband was at Ms. Kotowski's bedside, and admitted to the officer nearby that he was afraid she would wake up and believe he committed the attack (Tr. Vol. 8:215). By contrast, Mr. O'Laughlin stated that he was glad the victim had survived because it meant she could identify her assailant (Tr. Vol. 6:185).

O'Laughlin's evidence is to be viewed together with prosecution evidence regarding the victim's husband: that bleach-reeking towels

matching the victim's were found in the trunk of his car on the morning after the assault (Tr. Vol. 6:223-224,264); that an officer found wooden baseball bats in his garage (Tr. Vol. 6:94-95); that the carpenter who lived upstairs, the only witness to hear the attack, heard the sound of wood striking wood (Tr. Vol. 2:76, 83); that a swabbing from Mr. Kotowski's arm tested positive for the presumptive presence of blood (Tr. Vol. 7:189, 6:287-288).

Shortly after the victim was found, her husband, David Kotowski, appeared at the Dalton Police Station to report a "medical emergency" concerning the victim (who lived in Lee) without supposedly having any knowledge of the assault (Tr. Vol. 8:128-129).

These were all significant facts that led the First Circuit to conclude that the circumstantial evidence, in a light most favorable to the government, was insufficient to prove O'Laughlin's guilt. But the Petitioner makes several specific complaints that must be addressed.

The Petitioner complains about the First Circuit's treatment of the evidence of motive, and the court's finding that O'Laughlin's financial motive was "weak at best." See Petition, page 23, citing *O'Laughlin III* at 302.

The First Circuit could not have been more correct when it concluded that the financial motive was "weak at best". As the First

Circuit found, "A jury could permissibly conclude that he needed money to acquire crack cocaine, giving him reason to break into Mrs. Kotowski's apartment, a person whom he knew had money. However, Mrs. Kotowski testified that nothing of value was taken and no items, not even expensive jewelry in plain view, were disturbed." *O'Laughlin III* at 302.

The Petitioner's argument that the First Circuit "overlooked the fact that 'nothing was displaced, but the victim's purse was on the floor'" is incorrect. Petitioner's Brief, page 23.

The First Circuit cited the following facts (as found by the SJC) with respect to the purse: the purse was found on the floor, and contained Ms. Kotowski's credit cards, about $28 in cash, and a checkbook. *O'Laughlin III* at 292. But the purse was not in the bedroom.

Actually, there was conflicting testimony at trial regarding the location of the purse. Officer Skowron testified that the purse was on the floor in the entrance to the half-bath off the living room (Tr. Vol. 3:51). Officer Hill testified that the purse was on the counter in the kitchen (Tr. Vol. 7:21). Neither of these locations was near the victim's bedroom where the assault occurred. And in any event, the purse contained $28 cash, credit cards, and a checkbook, a fact acknowledged by the SJC. *O'Laughlin II* at 194.

There is simply no evidence that the purse was displaced. Any

inference that the purse was displaced is based on pure speculation, along with any inference that O'Laughlin ever touched it. Moreover, the First Circuit's conclusion that the financial motive was "weak at best" was even further supported by the fact that the purse contained cash.

The Petitioner next complains that the First Circuit dismissed the SJC's conclusion that the jury could draw a reasonable inference that O'Laughlin was frightened off before he could steal anything when he heard the neighbor speaking on the telephone. Petitioner's Brief, page 23.

This argument provides a specific example of the objective unreasonableness of the SJC's decision. Here is illustrated not only the weakness of the motive necessary for O'Laughlin to enter the apartment, but also the illogic of the reason offered to explain his exit without stealing or disturbing anything at the crime scene.

As the First Circuit understood, and the SJC failed to recognize, a reenactment demonstrated that the assailant would not have been able hear the neighbor call the police. *O'Laughlin III* at 302, fn. 18. The reenactment failed to demonstrate that a person could distinguish any words spoken by an upstairs neighbor, although a voice could be heard (Tr. Vol. 8:76). And during the reenactment, no one was screaming (Tr. Vol. 8:76). The SJC's conclusion that O'Laughlin fled, in the midst of an attack where the victim was screaming, because he heard the neighbor

call the police, is unreasonable.

The First Circuit astutely concluded that "[E]ven if the assailant deduced that the neighbor was calling the police in response to the attack, no rational juror could conclude that the placement of this phone call frightened him off given the volume and duration of Mrs. Kotowski's screams." *O'Laughlin III* at 302.

The First Circuit's further assessment that "the assailant's actions are inconsistent with O'Laughlin's purported financial motive" further supports the conclusion that the government's evidence of motive was "weak at best" and failed to provide the proper inferences necessary to support the conviction. See Petition, page 24; *O'Laughlin III* at 302. The Petitioner's theory that O'Laughlin had a financial motive for entering the apartment, and then abandoned the apartment after the attack "spiraled out of control" is pure speculation.

The Petitioner next complains about the First Circuit's assessment of the evidence that O'Laughlin possessed a master key. Petition, page 24. The First Circuit acknowledged that "one possible inference is that O'Laughlin used his master key to enter Mrs. Kotowski's apartment." *O'Laughlin III* at 302. The court goes on to find: "It is notable, however, that several others on the maintenance staff possessed a master key. Also, Mrs. Kotowski could have let someone familiar to her into the

apartment." *Id.*

The Petitioner complains that the First Circuit further ignored individual pieces of evidence. Petition, page 25. But the First Circuit opinion demonstrates that it did not ignore any of the evidence the Petitioner cites, such as the telephone records. See *O'Laughlin III* at 290-291.

The First Circuit later addresses some of these minimal pieces of circumstantial evidence: "We acknowledge the many strands of circumstantial evidence the prosecution has presented in this case; however, when viewing this evidence in its totality, as we must do on habeas review, that evidence is far from sufficient to establish O'Laughlin's guilt under Jackson." *O'Laughlin III* at 308.

Thus the First Circuit, while acknowledging that there was some circumstantial evidence, could not find that the totality of these "strands" sufficed to identify O'Laughlin as the assailant.

The Petitioner next complains about the First Circuit's conclusions regarding the baseball bat. Petition, page 25. It is important to note that the Petitioner emphasizes the proximity of the bat to the crime scene, but does not, and can not, argue that the bat was actually the assault weapon.

As the First Circuit astutely concluded, "there was little evidence

connecting the aluminum bat, a non-unique item in a residential complex, to the crime scene apart from the fact that it was found twenty-five yards from the residential complex the following day and the use of such an object was 'consistent' with Mrs. Kotowski's injuries." *O'Laughlin III* at 302.

This was the correct conclusion, where the evidence failed to establish that the bat was the assault weapon. The First Circuit considered the SJC's factual findings regarding the bat:

"Three small reddish brown stains on the bat tested positive for the presumptive presence of blood, only one of which tested positive for human blood. The three stains were swabbed and sent to the DNA unit for further testing. There was contamination in the DNA lab, and thus the tests consumed all the testable material without yielding results. An additional cutting from tape on the bat's handle, an area where the presumptive presence of blood could still be detected, was submitted to the laboratory. A state police DNA analyst concluded that while Mrs. Kotowski could not be excluded as a contributor, one in two of any randomly selected individuals could have been the contributor." *O'Laughlin III* at 294.

Therefore, the DNA testing on the bat merely suggested the possibility that one in two people could have contributed to the sample

from the tape (Tr. Vol. 7:204,244). The DNA expert further testified that she did not even detect the presence of blood on the sample she examined (Tr. Vol. 7:232,236).[3]

Moreover, as the First Circuit found, the only witness to hear the assault was the upstairs neighbor, a carpenter, who heard the sound of wood striking wood, but the baseball bat alleged to be the assault weapon was a hollow aluminum bat. *O'Laughlin III* at 291, 302.

The SJC noted that the bat was found on the ground a short distance from the victim's apartment. *O'Laughlin II* at 199. The Court further found that, "although covered with leaves and debris, the bat was otherwise clean when found." *Id.* at 200. The SJC did *not* find, as the Petitioner argues, that the bat was "recently cleaned." See Petition, page 25. When the police officer found the bat, it appeared clean and was slightly covered with leaves and grass (Tr. Vol. 6:69-70). But the trial judge struck from the record testimony that the bat had not been there for some time (Tr. Vol. 6:72). In other words, the record does not support the inference that the bat was only there for a short period of time (meaning that the assailant had recently placed it there), and had

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This led the Massachusetts Appeals Court to conclude that because forensic testing revealed several small stains "that could have been blood" and the DNA merely showed that there was a possibility that it could have been used to commit the crime, it was "just as likely that it had been used in a baseball game, particularly where the testing suggested that the DNA was not fresh." *O'Laughlin I* at 819.

"recently been cleaned".

All the evidence fails to create the necessary inferences to conclude that the bat was the assault weapon. The First Circuit was correct in its evaluation of the evidence and determination that the SJC's opinion was objectively unreasonable.

The Petitioner complains that the First Circuit minimized the evidence of the bruises and marks on O'Laughlin's face. Petition, page 26. The First Circuit found that, "these bruises and marks have minimal, if any, probative force given the fact that they were not even noted by Officers Tierney and Skowron when they were responding to an assault just minutes after the attack." *O'Laughlin III* at 304.

The evidence regarding whatever witnesses observed on O'Laughlin's face does not support the inference that he was injured during the attack. Morever, the evidence was contradictory. Officer Tierney testified that he observed a scratch on O'Laughlin's left cheek, a cut on his chin and a bruise on his neck, but he was not certain if the injuries were fresh. *O'Laughlin II* at 201. The other officers made no such observation: Officer Buell merely observed a small circular mark (Tr. Vol. 6:227), and Officer Hill admitted that it might have been just a blemish (Tr. Vol. 7:34). O'Laughlin consistently answered that it was a pimple (Tr. Vol. 4:54; 6:227,256; 7:34). His ex-wife, a Commonwealth witness,

testified that on the day *prior* to the assault she had seen a blemish on his face that she believed was infected (Tr. Vol. 3:193).

In fact, the SJC contradicted itself when it acknowledged that the police could not be certain that the marks were fresh, but nevertheless concluded that O'Laughlin could have sustained them during the assault. *O'Laughlin II* at 201.

It must finally be emphasized that there was no medical evidence that Ms. Kotowski scratched the assailant (although she had defensive wounds on her hands), leaving the conclusion that O'Laughlin sustained the marks during the assault totally to conjecture.

For these reasons, the First Circuit correctly found that the evidence regarding the marks had minimal probative force to prove that he was the assailant. The Petitioner's argument that O'Laughlin could have received the "bruises and marks" during the assault is pure speculation.

The Petitioner argues that the First Circuit's characterization of the blood evidence is flawed. Petition, page 27. The First Circuit found, "Considering the large amount of blood, it is difficult to fathom how O'Laughlin was able to avoid having any blood or other DNA evidence connect him to Mrs. Kotowski." *O'Laughlin III* at 304.

The First Circuit here is further commenting on the absence of any

physical evidence connecting O'Laughlin to the crime scene. There is no flaw in the First Circuit's astute observation that despite the copious amount of blood at the crime scene, there was none on O'Laughlin or in his apartment, despite the efforts made by the prosecution to explain why there would be no blood on the assailant.

The Petitioner suggests that the First Circuit perhaps had imposed a requirement that the prosecution present blood or DNA evidence to connect O'Laughlin to the crime. Petition, page 28. Of course, the First Circuit never placed any such requirement on the prosecution, and repeated several times throughout its opinion that no direct evidence was required and circumstantial evidence, had it been sufficient, would have met the *Jackson* standard.

The Petitioner complains about the First Circuit's assessment of the consciousness of guilt evidence. Petition, page 26. But the First Circuit was correct when it found that the evidence of consciousness of guilt was insufficient to allow jury to permissibly conclude O'Laughlin's guilt beyond a reasonable doubt. *O'Laughlin III* at 303.

With respect to consciousness of guilt, the First Circuit compared the instant case to *Juan H. v. Allen*, 408 F.3d 1262, 1278-1279 (9th Cir. 2005), where the evidence is "far more reflective of consciousness of guilt than what we have here". *O'Laughlin III* at 307. In *Juan H.*, the Ninth

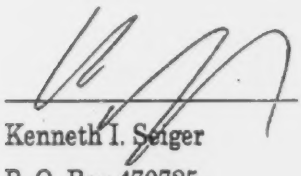
Circuit granted habeas relief, and the Supreme Court denied certiorari. *Juan v. Allen*, 546 U.S. 1137 (2006).

In short, the First Circuit did not ignore any circumstantial evidence when it concluded that: "Based on the record before us and drawing all reasonable inferences in favor of the prosecution, we hold that it would be overly speculative to conclude O'Laughlin to be the assailant beyond a reasonable doubt. Accordingly, we conclude that the SJC's decision to uphold O'Laughlin's conviction was objectively unreasonable." *O'Laughlin III* at 308.

CONCLUSION

For all the above-stated reasons, the Respondent Michael O'Laughlin requests that this Honorable Court deny the Petition for Certiorari.

Respectfully submitted,
MICHAEL O'LAUGHLIN
By his attorney:



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